No. 87-5840

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD MCNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES,

Appellee.

On Appeal from the Court of Appeal of the State of California Fourth Appellate District, Division One

BRIEF AMICUS CURIAE FOR THE BARKER FOUNDATION IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether an unwed, noncustodial father is entitled to custody of (or visitation rights with) a seven-year old child to whom he is effectively a stranger, where the child has adjusted happily to the parenting of an adoptive couple with whom she has lived her entire life and where a trial court has found that reunification of the father and child would cause the child "extreme emotional and psychological harm"?

2. Whether, under the Equal Protection Clause, an unwed, noncustodial father has an absolute right to "veto" the adoption of his newborn child simply because mothers and presumed fathers have such veto rights?

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BRIEF AMICUS CURIAE FOR THE BARKER FOUNDATION IN SUPPORT OF APPELLEE

This brief is filed on behalf of the Barker Foundation in support of Appellee.[1]

INTEREST OF THE AMICUS CURIAE

The Barker Foundation is a private, nonprofit adoption agency, licensed in the District of Columbia and Virginia, which has arranged over 3500 adoptions over a forty-three year period. In recent years, Barker has placed approximately seventy children each year.

In Barker's view, Appellant's claims for relief gravely threaten the continuing viability of the adoption process.

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[1] Consents from counsel for all parties have been filed with the Clerk of the Court.

If acceded to, they will make adoption of illegitimate children virtually unworkable, cast into doubt the validity of existing adoptive relationships, dissuade potential adoptive parents from pursuing the adoption alternative, and leave thousands of adoptable children in institutions or the limbo of foster care. As an organization with a philanthropic viewpoint, and a first-hand knowledge of the benefits (and real-world impediments to) adoption, Barker has no interest in the vindication of California law except to the extent that it establishes a fair and workable framework for adoption.

THE STATUTORY SCHEME

Modelled on the Uniform Parentage Act,[2] the 1981 California statutory scheme governing parental rights, child custody and adoption may be summarized as follows.

The legal relationship of parent and child in California expressly extends "equally to every child and to every parent, regardless of the marital status of the parents." Cal. Civil Code §§ 7001, 7002 (West 1983). A mother and child relationship is established either by "proof of her having given birth to the child," or in an action brought by "any interested party." Cal. Civil Code §§ 7003, 7015 (West 1983). The father and child relationship, in turn, can be established in a filiation proceeding, except that certain men (i.e., each father who either (i) has had legal custody as a result of an actual or attempted marriage, or (ii) "receives the child into his home and openly holds out the child as his natural child") are rebuttably presumed to be fathers ("presumed fathers"). Cal. Civil Code §§ 197 (West 1982), 7004, 7006 (West 1983). Other fathers are referred to herein as "putative" fathers.

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[2] The Uniform Parentage Act has been enacted in seventeen states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington and Wyoming.

Section 4600 of the California Civil Code sets forth the custodial rights of parents and third parties. Without distinguishing between presumed and putative fathers, Section 4600 establishes a preference for parents in awarding custody, and further provides:

> (c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child . . . .

Thus, Section 4600 assumes that custody is an important but not absolute right of a parent, sets a standard for changing custody over the objection of the parent, and identifies the best interests of the child as an important State interest.

The California adoption provisions reflect the policy judgments implicit in Section 4600 and the need to make the adoption process prompt and final. Specifically, parents who have had actual or legal custody (i.e., the child's mother and "presumed" father) must consent before the adoption alternative is pursued. Cal. Civil Code §§ 197, 224 (West 1982); Cal. Civil Code §§ 7004, 7017 (West 1983). Consent, once filed, can be withdrawn by either mutual agreement of the adoption agency and the relinquishing parent(s), or by a judicial finding that "withdrawal of the consent to adoption is reasonable in view of all the circumstances and that withdrawal of the consent would be for the best interests of the child." Cal. Civil Code §§ 224m, 226a (West 1982).

Although California does not permit putative fathers like Mr. McNamara to "veto" an adoption, such fathers (if identified during the statutorily-mandated inquiry which follows the filing of the biological mother's consent to adoption) are automatically entitled to receive

notice and a hearing on parentage (presumed or putative) and custodial rights *before* actual adoption proceedings can be instituted. Cal. Civil Code § 7017. If a Section 7017 hearing results in an "order . . . dispensing with a father's consent for the adoption of a child," it "may be appealed from" in accordance with procedures providing for highest priority on appellate dockets.[3] Cal. Civil Code § 7017(g); Cal. Civil and Criminal Rules 39(e) (West 1981 and Supp. 1987). In addition, under California Civil Code § 7006 (West 1983), the putative father had the power and right to stay a Section 7017 proceeding to terminate his parental rights by filing a filiation proceeding.

STATEMENT[4]

Katie M., born July 18, 1981, was conceived during the latter part of a casual, nonmarital three-month relationship. Following termination of the affair in November, 1980, and throughout the pregnancy, her biological father, Appellant McNamara, "had talked to [Katie's mother] maybe once on the phone and saw her for like ten minutes." 1981 Tr. 29. McNamara was not told that a child was due.

While in the hospital, Katie's mother indicated a strong interest in adoption. She received counselling and selected (from among profiles offered by a social worker) a two-parent family with whom she wished her daughter

[3] Throughout the years of this case, McNamara never exercised this right to request an expedited appeal. Had he acted, the amount of time that this case has spent on appellate calendars likely would have been substantially less.

[4] The transcript of the December 18, 1981 hearing on the County's petition to terminate McNamara's rights will be cited as "1981 Tr. ——." The transcripts of the February 25-26 and February 27, 1985 hearing on remand will be cited as "2/25/1985 Tr. ——" and "2/27/1985 Tr. ——," respectively.

to be placed. Katie was placed with foster parents on July 21, 1981, and with the adoptive parents selected by her mother on August 24, 1981. She has lived with her adoptive parents and her "brother," Joshua, continuously since then—for seven full years—becoming completely integrated into the family and a happy, healthy child. J. App. 22-25.

On August 1, 1981, Katie's mother told McNamara of the birth and asked that he consent to the adoption. McNamara then met with the County social worker on August 5, informing her that he would not accept custody. He met with the social worker again on August 10; during that second meeting, she explained that he could file a filiation proceeding or wait for the County to bring a Section 7017 hearing to terminate his parental rights. 1981 Tr. 13, 30, 31. Although McNamara realized that Katie's mother intended to relinquish Katie for adoption with the express understanding that the child would be placed with a couple whom neither biological parent knew, he told the social worker that he would wait for the termination proceeding, and—when asked whether he had changed his mind about accepting custody—replied only that he did not know what would serve the best interests of his child. *Id.*, at 14, 31. On the same day, the County filed a petition under Section 7017 seeking to terminate McNamara's parental rights.

Honoring requests by McNamara, the social worker arranged for him to visit Katie on August 17 and November 3, 1981. 1981 Tr. 15. By mutual agreement, each meeting lasted half an hour to 45 minutes. 1981 Tr. 33. After the August 17th meeting, McNamara said—for the first time—that he wanted custody. The social worker believed that McNamara's request came too late, since the child had already been removed from the biological mother's custody. 1981 Tr. 15-17, 19-20.

THE PROCEEDINGS BELOW

The Section 7017 hearing on the County's petition to terminate McNamara's rights was held in December 1981. The County called two experienced social workers who had extensive knowledge about the adoptive family and the quality of their home life. They testified that the infant had developed strong emotional ties to the adoptive mother, that "bonding" had already occurred, and that the family provided an excellent, loving environment, with a "full-time, at home mother." They further testified that any change in custody would be harmful to the child and that it would be in Katie's best interests to remain with the adoptive family. 1981 Tr. 12, 22. McNamara testified that he had initially refused to accept custody because "at that time I had [two young sons] with me, without a certain length of time, and I felt that it would be difficult [with] an infant but I knew that after a child grows up it's a lot easier to take of them . . . ." 1981 Tr. 36. McNamara further testified that at the second meeting with the social worker, he still did not want custody, but that by the third meeting he did. 1981 Tr. 36. Significantly, McNamara admitted that he had actual knowledge of his right under California Civil Code § 7006 to bring a filiation proceeding. McNamara did not offer any evidence to mitigate the emotional injury that Katie would experience if she were separated from her adoptive parents.

The trial court, relying on the evidence offered by the social workers that Katie had developed strong emotional ties and had bonded with her adoptive parents, concluded that the best interests of the child required that she stay with the adoptive couple. However, on August 22, 1984, the California Supreme Court reversed the trial court's decision, holding that the trial court had erred in failing to apply the custody standards of Section 4600 to the case and remanding for a factual determination of whether the child would suffer any detriment by giving

McNamara custody. The State court recognized that the child had bonded and that breaking that bond could be detrimental. Hence, the welfare of the child required consideration of the passage of time. J.S. App. 49a.

On remand, the County called Dr. Gerald E. Nelson, a board-certified psychiatrist. Having evaluated Katie in her adoptive family setting, he testified that if Katie's placement in the adoptive home were terminated, she would certainly experience six months to a year of severe psychological trauma:

> She would go through a very painful process which would—we call grief. It would be as though her parents had died, and she would initially be terrified, very sad, lonely. She would cry and she would protest, searching for her parents, trying to get any adult around her to return her to her parents.
>
> . . . .
>
> The second phase of loss, the despair, will last for several weeks . . . . Then the child will start to detach . . . . [S]he will stop thinking about her parents. She would stop running to the door. Though any time she hears a woman's voice that might sound like her mother or a car goes by that looks like her family . . . she will perk up and think, oh, they have finally come back for me, and this will go on again for several months.
>
> And, actually, if she were well cared for, all of this would be put into the unconscious and defended against, and that she would then resume her growth and development . . . . But what we find with these children is all through their lives, we see evidence of this trauma in that she will be sensitized to loss now.

2/25/1985 Tr. 79-81. Dr. Nelson further testified to the number of ways in which the lifelong sensitivity to loss might manifest itself:

> . . . So this child will fear that this might happen again. So she could do . . . one of a number of things. One, she might not form attachments. She would, say, . . . rather . . . not form attachments than to go through the pain of losing this attachment and suffer pain that I did when I was little. This will not be conscious . . . . She would withdraw . . . .
>
> Secondly, she may develop a clinical depression which is every time she has a loss . . . [s]he will then . . . immediately be placed back in the emotional and psychological framework that she . . . was in when she sustained the primary loss . . . .
>
> She will feel like a small child, overwhelmed with fear and sadness . . . . [T]here are reports that suicides occur when things like this happen, and she may need psychotherapy and anti-depressants.

2/25/1985 Tr. 81.

> . . . She might become ansus [sic], which means that she is vigilant; she is constantly fearful that someone is going to—to cause her to lose someone, and she may numb out.
>
> She may develop the mechanism of becoming insensitive. Now, she may not only become fearful of loss, but she will also be insensitive to the feelings of others because she has numbed out her own feelings.
>
> The insensitivity affects the child's ability to learn . . . .
>
> If she has numbed out, she needs more intense, clear messages which means that she is less able to adapt and in a complex situation, . . . their social skills are diminished.

2/25/1985 Tr. 87-8. Elaborating on testimony that the trauma of a change in custody would cause Katie to regress "across the board in all of the psychological and developmental phases that have to do with forming relationships," the psychiatrist further stated that certain developmental setbacks involving cognitive skills might not be recouped:

> Generally, you see an arrest of development . . . . The child still grows, but the emotional and psychological development seems to stop, and there are cognative [sic] things that go on all the time, like how to blend sounds, how to use speech in a certain way. Certain cognative [sic] skills seem to get lost and they lose them forever.
>
> Things like math skills, spelling skills, things like that seem to be associated with traumatic events in a child's life.

2/25/1985 Tr. 83.

Based on the expert and lay testimony, the trial judge determined that, because of the length of time the case had been pending in California courts:

> [T]he evidence is clear and convincing and, in fact, uncontradicted that Katie would suffer extreme emotional and psychological harm should she be removed from the [adoptive] home, and this harm constitutes detriment within the meaning of Civil Code 4600.
>
> I find that it would be in the best interest of the child that custody be awarded to [the adoptive parents] who are in almost every sense the true parents of this child.

2/27/85 Tr. 33. The Court of Appeal affirmed in a split decision filed April 30, 1987, noting that the record "firmly supports" the trial court's "factual determination as to the existence of [psychological] harm" to Katie. J.S. App. 6a, 8a. The San Diego County Superior Court entered a decree of adoption on August 7, 1987. On April 18, 1988, this Court deferred the question of jurisdiction to the hearing on the merits.[5]

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[5] This Court indeed lacks jurisdiction. Jurisdiction on appeal is precluded because at no time did McNamara present to State

SUMMARY OF ARGUMENT

Adoption is an important, worthy institution. State legislators give careful consideration to the complex statutory schemes necessary to make adoption work. Appellant's claims for relief, if acceded to, would make the process unworkable with respect to children of unwed, noncustodial fathers, and would greatly undermine public confidence in the institution of adoption as a whole.

The equitable relief sought here—custody and visitation rights—should be denied. Such relief is inappropriate because it contravenes important rights of the adopted child and her adoptive parents. McNamara's request for visitation rights is unworkable, impractical, contrary to the well-being of Katie and her adoptive parents, and inconsistent with the reasonable policy choices made by California legislators and courts. McNamara, further, has no constitutional right to protect here, as demonstrated by this Court's cases.

The relevant California statute does not unconstitutionally discriminate by failing to vest unmarried, noncustodial fathers with the right to "veto" adoptions. The "discrimination" serves important governmental objectives and is substantially related to the achievement of those objectives.

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courts any contention drawing into question the validity under the Constitution of a State statute; nor did the State courts decide any such issue. Certiorari jurisdiction does not lie for the reasons stated in Appellee's brief.

Furthermore, although Appellant cites authorities which discuss substantive rights under the Due Process Clause, his filings with this Court—and especially his statement of the issues—fail to address due process. In these circumstances, the Court should not *sua sponte* consider the extent to which the Due Process Clause governs the substantive rights of unwed, noncustodial fathers. See Sup. Ct. R. 15(a).

ARGUMENT

I. Appellant's Claims For Relief Imperil the Adoption Process.

As surely as it will shape the psychological and emotional destiny of a seven-year old child, and decide the fate of an adoptive family which has long flourished under color of State law, this case will determine the extent to which adoption remains a viable choice for biological and adoptive parents.

The benefits of adoption scarcely need stating. Adoption safeguards the welfare of children whose parents are unwilling or unable to care for them; eliminates the need for long-term State guardianship—a role that, despite efforts on many levels, has proved almost impossible for governments to fill effectively or economically; and bestows on illegitimate children the benefits of legitimacy. Adoption also saves biological parents from distressful burdens with which they would be unable to cope, thus freeing them to lead more productive lives. It provides a practical alternative to abortion; and—critically—secures for adoptees and childless couples opportunities to develop and enjoy deeply satisfying parent-child relationships.

The value of these benefits is inestimable, but there are a few objective indications. Over 140,000 children find homes each year through adoption. National Committee for Adoption, *Adoption Factbook* 5 (1985). Adopted children, moreover, are more likely to live in two-parent households: 90% of adopted children surveyed in 1982 had a currently married mother, as compared with 77% of children living with their birthmothers. *Id.*, at 62. Adopted children "enjoy more socioeconomic advantages than children who remain with their unmarried birthmothers." *Id.*, at 12. The 1982 study, furthermore, showed that "unmarried biological mothers who made

adoption plans advanced further educationally, were more likely to subsequently marry, and were less likely [indeed, less than half as likely] to receive public assistance than birthmothers who kept the child." *Id.*, at 12, 58.

These impressionistic data simply serve to illustrate the broader truth that adoption is a crucial element in the nation's approach to insuring decent lives and developmental opportunities for its children. It is, moreover, an approach that has required careful legislative consideration and complex regulation, as well as case-by-case judicial supervision, since the circumstances in which adoption is considered are diverse and the viewpoints relevant to each proposed adoption unique. Until now, the States have made the policy decisions and provided the supervision necessary to make the whole process work. It is indeed difficult to see how federal courts could assume the States' roles.

McNamara, however, would make virtually every aspect of the adoption of children of unwed, noncustodial fathers a constitutional issue. McNamara seeks to reinstate, as a matter of constitutional law, parental rights terminated fully seven years ago. He believes he has a right to this relief—not knowing his child or how she, as an *individual*, might react to such a drastic change in her circumstances—despite a State court finding (and expert testimony) that revocation of the adoptive placement would cause the child extreme emotional and psychological harm. Furthermore, McNamara asks for visitation rights, even though California adoption law does not provide for visitation as of right by biological parents, and even though the State courts considered the evidence offered below both in support of and against his visitation proposal and rejected that proposal. McNamara would have this Court require that every man alleged to be a father or claiming paternity be accorded a right to, effectively, "veto" an adoption by withholding consent.

This relief, if granted, would seriously compromise the adoption process. Prospective adoptive parents might well reject an alternative that involved a real risk of being forced to relinquish a child whom they had raised to the custody of a complete stranger. The fact that this relinquishment might be gradually, rather than abruptly, imposed—or that (in the event visitation rights alone are granted) it might involve only the loss of autonomy in the adoptive parent-child relationship, coupled with unsolicited and unwanted interference by biological parents—can hardly be expected to provide additional encouragement to such prospective parents. Moreover, as adoptive parents become aware that a natural father might, on any day, decide he had been denied an opportunity to develop a relationship with his child, the status of all current and future adoptions would be called into question. New adoptive parents could well be discouraged in their efforts to forge bonds with their children, knowing that in the future those children might be taken from them. In short, confidence in the adoption process as a whole would diminish sharply.

The veto requirement that McNamara asks this Court to impose has equally pernicious implications. Adoption must be quick, final and inexpensive if it is to serve the developmental needs of children, and if it is also to meet the needs of couples of all income levels. But a veto power in unwed, noncustodial fathers would interminably delay the adoption process and cause a drastic increase in adoption costs. Adoption agencies that arranged placements without effecting actual notice on all possible fathers would risk legal liability; and any adoption they arranged might prove voidable. Children whose fathers could not be located—a frequent phenomenon—would become unadoptable. Even where notice was effected, biological fathers might well vacillate in deciding on consent, and biological parents would find themselves embroiled in inappropriate negotiations or bitter disagreements. Mean-

while, their children would remain in legal limbo or with biological mothers unable to care for them properly. Developmental needs simply would be put on hold.

Contrary to McNamara's contentions, the serious blow he proposes that this Court inflict upon the adoption process is not compelled by the constitutional interest in parenting which the Court's caselaw delineates. As discussed below, whatever McNamara's rights may be, they do not encompass a right to an order granting custody or visitation rights. Furthermore, the "consent" provisions of which he complains, when viewed in the context of the entire State statutory scheme, are neither irrational nor invidious but instead are directly related to the important governmental interest described above: creating a workable system of adoption.

II. Where There Has Been A Seven-Year Adoptive Placement, An Unwed Father Who Has Never Had Custody Is Not Constitutionally Entitled To Custody Or Visitation.

McNamara frames his issues in equal protection terms and focuses primarily on the initial error in terminating his rights. The issue posed by this case, however, is more accurately to be regarded as one of substantive due process: whether McNamara's "opportunity interest" in developing a parent-child relationship with Katie overrides the now supervening interests of Katie herself, her adoptive parents, and the State. Whatever the extent of McNamara's opportunity interest in other contexts, *see, e.g., Lehr v. Robertson*, 463 U.S. 248, 263-65 (1983); *Stanley v. Illinois*, 405 U.S. 645, 657 n.9 (1972), that interest stops short of a constitutional right to imperil the developmental potential and psychological well-being of a child, abrogate the liberty interests of a family unit now long-established under color of State law, and strip the State of the power to implement a rational statutory scheme governing adoption.

A. McNamara Never Developed A Substantial Relationship With His Child And Has No Constitutionally Protected Right To A Relationship With That Child.

Under the facts of this case, McNamara has no constitutional right to a relationship with his child. In *Lehr*, this Court made absolutely clear that unwed fathers have merely "inchoate rights" to develop relationships with their illegitimate children and that "the mere existence of a biological link does not merit equivalent constitutional protection . . . ." 463 U.S. at 261. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." 463 U.S. at 260, quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). When an unwed father demonstrates a full commitment to accept the responsibilities of parenthood, then his interest in the child receives protection under the Due Process Clause. *Id.*

As Justice Stevens noted, "the difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* [*v. Walcott*, 434 U.S. 246 (1978)] and [*Lehr*], is both clear and significant." 463 U.S. at 261. In *Stanley v. Illinois*, *supra*, the unwed father had lived with, raised and supported his three children all of their lives. In *Caban v. Mohammed*, *supra*, the unwed father and mother lived together for approximately five years. During that time, Caban lived with, raised and supported his two children. Both Stanley and Caban thus had assumed all of the responsibilities of fatherhood. Under those facts, they had constitutionally protected rights to their relationships with their children.

The unwed fathers in *Quilloin* and *Lehr* had failed to assume the full responsibilities of parenthood and did not establish substantial relationships with their children. Accordingly, their rights did not merit constitutional protection. In *Quilloin*, the unmarried father did not

live with or raise his son. Over the years, he had provided support on an "irregular basis" and had visited with the child on "many occasions." Notwithstanding some relationship with the child, this Court concluded that the father had " . . . never shouldered any significant responsibility with respect to daily supervision, education, protection, or care of the child . . ." and that his rights could be terminated. 434 U.S. at 256.

In *Lehr*, the father did not live with, raise or support his daughter. He alleged that the mother had concealed the child's whereabouts from him, that he had hired a private detective to locate the child, and that he had offered, upon finding her, to support her. The father further alleged that the mother rejected his offer of support, refused any visitation and threatened to have him arrested. Thereafter, the father filed a paternity suit admitting paternity and requesting an order which would direct him to pay child support. 439 U.S. at 268-69. Notwithstanding his efforts to establish a relationship and the mother's concerted efforts to thwart him, this Court concluded that the father had no right to a hearing, that he had never developed a substantial relationship with his daughter and that his "inchoate" rights could be extinguished.

Like the fathers in *Lehr* and *Quilloin*, McNamara has never developed a substantial relationship with or assumed full responsibility for his child. Although he testified to an annual income of $15,000 to $17,000, the record does not show that McNamara ever offered to provide financial support or educational opportunities for his child. Nor has he ever engaged in any daily supervision of the child. Seven years ago, he visited the child twice. He is, for all practical purposes, a total stranger to the child. In short, McNamara did not take advantage of the opportunities that were available to him, and his "inchoate" rights do not merit constitutional protection.

The father in *Lehr* had a far stronger constitutional claim for entitlement to a relationship with his child than does McNamara. In *Lehr*, the father instituted a paternity suit—voluntarily submitting himself to the jurisdiction of the court and the power of the State—and asked for a court order directing him to support the child. McNamara had actual knowledge that he could institute a filiation proceeding, stay the termination proceedings, establish his paternity and begin to support his child. He chose not to pursue this right under State law and, in turn, rejected the opportunity that it offered to assume full parental responsibility for his child. Moreover, in *Lehr*, the mother actually sought to conceal the child's whereabouts from Lehr and to prevent the development of a relationship between the father and child. In the instant case, the State, in fact, made the child available for visitation. The State acted reasonably in accepting custody of the newborn from an unmarried woman, placing the newborn in a State-approved foster home and instituting the appropriate legal proceedings.[6]

B. Katie's Rights and the Rights of Her Adoptive Family Preclude Any Reinstatement of McNamara's Parental Rights.

A child is not the property of parents, biological or adoptive. Familial relationships do not appear and disappear upon issuance of an injunction. While, undoubtedly, government should presume in the first instance that a child's interests and well-being coincide with a custodial

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[6] Even assuming that the initial termination of McNamara's rights was improper, it does not follow that a right to parent existed seven years later. *See Schenck v. United States*, 249 U.S. 47, 52 (1918) ("we admit that in many places and in ordinary times the defendants in saying all that was said would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . ."). *Cf. Jacobsen v. Massachusetts*, 197 U.S. 11 (1905).

parent's expressed desire to retain parental rights, *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), that presumption cannot be indulged where there has been no custody and the child's well-being lies elsewhere. In short, the child herself has rights—rights, e.g., to avoid psychological trauma, *see Parham v. J.R.*, 442 U.S. 584 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), and to be permitted to reach her developmental potential. *Wisconsin v. Yoder, supra*, 406 U.S. at 209-49 (concurrence of White, J.; dissent of Douglas, J.); *Prince v. Massachusetts*, 321 U.S. 138, 170 (1943). *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-76 (1976). *Cf. also, e.g., Schall v. Martin*, 467 U.S. 253, 266 (1984) (recognizing that children are peculiarly susceptible to psychological harm). In addition, State law may create a protectible familial interest on the part of a child's actual custodian. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977) (hereinafter, *Smith v. O.F.F.E.R.*).

The corollary of this is obvious: government has no power to "award" a child, or "rights in" a child, as a remedy for a perceived infringement of a parent's civil rights. A biological parent's prayer for equitable relief does not justify sacrificing the conflicting rights of the child and of the child's custodian. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (it is a "basic concept of our system" that "legal burdens should bear some relationship to individual responsibility or wrongdoing"); *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940) (court of equity "may in the public interest, even withhold relief altogether"); *Hecht v. Bowles*, 321 U.S. 321, 329-30 (1944) (equity is "flexible" and characterized by "mercy and practicality").

Here, the testimony has been that a change of custody would devastate the child, psychologically and developmentally. The State courts accepted this testimony,

which is consistent with the current theories of experts in the field,[7] and which finds support as well in decisions of this Court recognizing the crucial link between established familial relationships and a child's development. *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 513 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977). *Cf. Lassiter v. Dep't of Social Services*, 452 U.S. 18, 32 (1981) ("child custody litigation must be concluded as rapidly as is consistent with

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[7] *See, e.g.*, J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* [hereinafter "BBIC"] 18, 31-35, 85-94, 147 (1979); J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 199-202 n. 10 (1979); S. Fraiberg, *Every Child's Birthright* 33-77 (1977); Provence, *Applications of Research on Parent-Child Relationships*, in Child Psychiatry: Treatment and Research 207-21 (1977); *Mother-Infant Attachment in Adoptive Families*, 56 Child Development 1543 (December 1985) (study concluding that "like nonadoptive mother-infant pairs, most adoptive mothers and their infants develop warm and secure attachment relationships"); *Continuity of Adaptation in the Second Year: The Relationship Between Quality of Attachment and Later Competence*, 49 Child Development 547 (September 1978) (study showing that infants found securely attached to their mothers at eighteen months showed superior adaptation and more autonomous functioning at two years than did infants found insecurely attached at eighteen months). *See also Bennett v. Marrow*, 59 App. Div.2d 492, 496, 399 N.Y.S.2d 697, 700 (1977):

> It was Dr. Provence's further testimony . . . that to remove a child from a [psychological, as opposed to biological] parent-child relationship would endanger the development of the child in many ways and could affect her academic success and her motivation to learn.
>
> This testimony is all the more significant in view of the record, which discloses that in January, 1977 [i.e., after a two-year separation of the child from her "psychological parent"] an intelligence test was administered to Gina Marie resulting in a score of 84, in the low-normal range, whereas in April, 1975 [before the separation] she scored 113. Despite efforts to explain away this rather disturbing pattern, it seems to be, at least to some extent, buttressed by the obvious and drastic decline in the physical, mental and emotional make-up of Gina Marie.

fairness"). Thus, according to the State courts, Katie was entitled to remain in her adoptive home and reinstatement of parental rights was a remedy unavailable to McNamara.

But Katie's rights are not the only impediment to McNamara's requests for custody and visitation rights. The record establishes as well a seven-year adoptive relationship, which developed under color of State law, and a familial bonding of the adoptive parents and their son with Katie. "[T]he importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life through instruction of children . . . as well as the blood relationship." *Smith v. O.F.F.E.R.*, 431 U.S. at 844. Although the liberty interests of families lacking a biological link must in large part be "ascertain[ed] from . . . the expectations and entitlements of the parties" under State law, such families cannot be dismissed for constitutional purposes "as a mere collection of unrelated individuals." *Id.*, at 844-45. In California, as elsewhere, "adoptive placement . . . implies a *permanent* substitution of one home for another." *Id.*, at 824, 826. *See* Cal. Civil Code § 228 (West 1982) (adoptive parents and their child will "sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation").[8]

[8] Although Katie technically was in a "preadoptive" setting prior to August 1987, that is a distinction without constitutional significance here. In contrast to the foster family relationship at issue in *Smith v. O.F.F.E.R.*, preadoptive families are not given to understand that they should love the child, but not too much. Instead, preadoptive placement is made for the specific purpose of allowing bonding to occur and avoiding the damage to the child of foster family limbo. Under California law, where a petition for adoption has been filed (as it was in this case), the State may "remove the child from the prospective adoptive parents only upon approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought." Cal. Civil Code § 224. A court can permit preadoptive parents to adopt despite opposition by the adoption agency if it finds that the agency's refusal to consent is not in the best interests of the child. *Id.*

In this case, Katie remained in a "preadoptive" setting for six and a half years, always pursuant to the County's insistence that the placement was valid and, for much of the period, pursuant to decisions of State courts upholding the termination of McNamara's rights. Although a preadoptive family might not at initial placement have familial interests of a nature such as would bear on a biological parent's constitutional claim for reinstatement of parental rights, the situation here was quite different. Given the legal rights and expectations that preadoptive parents do legitimately hold, the decisions of State courts purporting to terminate McNamara's parental rights, and the lengthy placement under color of State law, Katie's adoptive family has a constitutionally-protected liberty interest in their familial bond with the child.

Thus, the interests of Katie's adoptive family and of the State fully support the decisions of the courts below denying custody and visitation rights. Whatever the rights of biological fathers may be in circumstances such as McNamara's, equity should not aid them in efforts to tear apart the lives and psychological well-being of adoptive families, including, especially, the adoptive child.

C. California's Decision Not to Award Visitation Rights Must Be Respected.

As noted above, resolution of the often difficult problems arising from the parent-child relationship is fundamentally a State responsibility. *Lehr v. Robertson*, 463 U.S. at 256; *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982). In meeting this responsibility, the State must seek to make adoption fair and workable, and to insure that adoption meets children's needs to the fullest extent possible. Finality is crucial: adoption as an institution is gravely threatened when errors made at an early stage are permitted to "undo" a lengthy adoptive relationship.

The full force of the State's interest in adoption underlies its decision here to deny visitation, because, as the record reveals, McNamara actually seeks much more than visitation. He wants visitation rights that will ripen into custody, as his testimony below makes clear. 2/25/1985 Tr. 162, 163, 165, 166, 168, 169, 172-76, 180-82.[9] Moreover, McNamara evidently refuses to recognize the utter impracticality of his visitation rights proposal. Virtually insurmountable logistical difficulties aside, such visits can hardly be positive experiences for the child when her adoptive parents find themselves struggling during each visit to suppress the grief they feel at the renewed reminder of the prospective loss of their child. California's decision not to engage in such human experiments is commendable and compelling.

But even if McNamara could content himself with a remedy of visitation rights and no more, such relief nonetheless would be an inappropriate remedy for the alleged constitutional injustice he contends he suffered. California, respecting parental autonomy, does not provide for visitation of adoptes as of right by biological parents. *Cf. Odell v. Lutz*, 78 Cal. App. 2d 104, 77 P.2d 628 (1947). This is a valid policy choice by the State that reinforces the final as well as autonomous nature of the adoptive parent-child relationship. Research in the context of visitation rights ordered following divorces at-

[9] Indeed, he indicated that he might, but might not, permit the adoptive parents and sibling to visit Katie. 2/25/1985 Tr. 180-81. The testimony accepted by the courts below is that a gradual reunification would be less traumatic to Katie, but just as damaging ultimately, as an abrupt change, even if McNamara did a superb job of parenting and regardless of whether or not he arranged for Katie to have therapy. 2/25/1985 Tr. 95-98, 100-07. In this connection, *see BBIC* 95 ("A child's attachment to his psychological parent is normal and therefore not subject to therapeutic efforts [by mental health professionals] which are designed to affect pathologic manifestations. [A child] cannot be 'cured' of her love for her foster parents").

tests to the trauma children experience when subjected to authority of multiple parent figures. *See* J. Wallerstein & J. Kelly, *Surviving the Breakup: How Children and Parents Cope With Divorce* 27-30, 37, 49, 88, 123-26, 141-42, 277-78, 293-96 (1980) and J. Goldstein & A. Solnit, *Divorce & Your Child* 47, 98 n.1, 106 (1984).[10] Exposing a child to such conflicts perhaps can be justified following a divorce, since the child, and not just the parents, can be presumed to have an interest in maintaining already developed relationships with the competing adults. But justification for a court-imposed "open" adoption—where the child regularly sees both biological and adoptive parents—is hard to find. Even where biological and adoptive parents voluntarily choose an open adoption procedure, experts who study adoption are less than convinced that the benefits of the procedure outweigh the costs:

> [T]his open adoption practice primarily benefits the birth parents, and critics of the practice point out the following: (1) the practice dilutes the process of parental entitlement, a crucial element in adoption [by which the adoptive parent comes to have 'feelings of parental rightfulness to the child']; (2) the practice complicates the process of telling the child about the adoption and may lead to considerable confusion on his part; (3) the open adoption concept paves the way for a split parental identification, the results of which are patently unclear; and (4) the practice can lead to a child attempting to play the various parental figures against each other.

[10] *See also BBIC* 12:

> Unlike adults, who are generally capable of maintaining positive emotional ties with a number of different individuals, unrelated or even hostile to each other, children lack capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children become prey to severe and crippling loyalty conflicts.

There are, in addition, practical problems. For the adoptive parents, open adoption, however euphemized, reduces their role to that of caretakers. The parent-child bond, which begins with a certain fragility, and is made stronger with each passing day under a traditional arrangement, is significantly compromised. To do an effective job, adoptive parents must feel that this is their own child, not that they are filling in for the 'real' parents. Adoptive parents should not be expected to wonder if the birth mother would approve of the handling of a given situation. Finally, to the extent that the birth parents are struggling with guilt over not assuming the parental role, the adoptive parents may feel that they have somehow stolen the child. This arrangement can hang over the family like a cloud that will not dissipate.

There are problems for the adopted child as well. Children need to know who are the real parents, and who carries ultimate authority over their lives . . . .

> Open adoption violates the very essence of sound adoptive practice since there is no unconditional severing of the earlier parental ties, the legal relinquishment notwithstanding.

Smith & Miroff, *You're Our Child: The Adoption Experience* (1987).[11] Clearly, if the pros and cons of visitation during adoption are to be decided by government at all, it would be a matter for legislative, and not judicial, judgment.[12] Even if this were not so, the State

[11] *See also Some Theoretical Considerations of Confidential Adoptions, Parts I and II*, 2 Child & Adolescent Social Work Journal 13-21, 69-82 (Spring 1985, Summer 1985); M. Jones, *The Sealed Adoption Record Controversy: Report of a Survey of Agency Policy, Practice and Opinions* (Child Welfare League of America 1976) (in a survey of 163 adoption agencies, *no* agency said it would encourage contact between the parties after adoption).

[12] There are other practical reasons for California's no visitation policy as well. *See Caban v. Mohammed*, 441 U.S. at 410 n.20 (Stevens, J., dissenting) (citing a 1961 Florida study of 500 independent adoptions which showed that "16% of the couples who had

courts here considered the evidence McNamara offered in support of visitation and have rejected the proposal.

In sum, McNamara's claim that he is constitutionally entitled to custody or visitation rights cannot, at this late date, be viewed independently of the interests of Katie, her adoptive family, and the State. So viewed, McNamara's claim must fail.

III. The California Statute Requiring The Consent of Unwed Mothers And Presumed Fathers For Adoptions Does Not Violate The Equal Protection Clause.

McNamara has raised two arguments that the California statute—which requires the consent of biological mothers and presumed fathers as a prerequisite to adoption, but not the consent of unwed, noncustodial fathers —violates the Equal Protection Clause. First, McNamara contends that the statute draws an impermissible distinction between presumed fathers and putative fathers. Second, McNamara contends that the statute, as applied, makes an unconstitutional gender-based distinction between unwed mothers and unwed fathers. McNamara's contentions are unfounded because the statute makes constitutionally permissible distinctions.

Subjecting men and women to "disparate treatment when there is no rational relation between the disparity and an important state purpose" contravenes the Fourteenth Amendment. *Lehr v. Robertson*, 463 U.S. at 266.

direct contact with the natural parents reported subsequent harassment, compared with only 2% of couples who had no contact"). Another much more recent study notes that biological fathers who institute searches for their adopted children, in contrast to biological mothers who initiate such searches, are highly likely to harbor serious thoughts of taking the child back. Deykin, Patti & Ryan, *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birthfathers*, 58 Am. J. Orthopsychiatry 240, 244, 248 (April 1988). California's decision not to expose adoptees to kidnapping or adoptive parents to harassment should be respected.

States may not discriminate arbitrarily or irrationally among men and women in determining parental rights. *Id.*, at 264, 268 n. 27. But there is nothing invidious, irrational or happenstance about the operation of California's consent provisions. The distinction between presumed and putative fathers focuses on the parent who has actual or legal custody of the child and is constitutionally permissible. *Quillion v. Walcott*, 434 U.S. at 256 ("Appellant's interests [as an unmarried father] are readily distinguishable from those of a separated or divorced father, and accordingly [we] believe the State could permissibly give Appellant less veto authority [over an adoption] than it provides to a married father"). Thus, McNamara's first contention is without merit.

Turning to McNamara's second contention, the consent provisions do not violate the Equal Protection Clause because they make gender-based distinctions that serve important governmental objectives and are substantially related to achievement of those objectives. *Parham v. Hughes*, 441 U.S. 347, 359 (1979); *Caban v. Mohammed*, 441 U.S. at 388. The welfare, prompt placement and final adoption of illegitimate children are important governmental interests. *Lehr v. Robertson*, *supra* (State has compelling interests in prompt, final adoption placements); *Caban v. Mohammed*, *supra* (State has a strong interest in providing for the moral, emotional and physical needs of children). In his brief, Appellant concedes this point. Br. at 29-30. The State's interest is even greater where the welfare of newborn infants is concerned. The California consent provisions are substantially related to the achievement of these important State interests.

The "discrimination" of which McNamara complains is permissible because unwed, noncustodial fathers and unwed mothers are differently situated. Only the biological mother carries the child and has the constitutional

right to decide whether to bear it. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-75 (1976). Throughout pregnancy the mother must face decisions about how best to care for the developing child. The mother's identity is known with certainty and, in most cases, she will have custody of the newborn infant. Hence, she is the logical choice as the parent with the power to consent to the adoption.

Unwed biological fathers, on the other hand, are not readily identifiable. Many unwed fathers cannot be found, others deny paternity and still others simply refuse to cooperate in the adoption process. *Caban v. Mohammed*, *supra*, 441 U.S. at 380 (Stewart, J., dissenting) (". . . the vast majority of unwed fathers have been unknown, unavailable, or uninterested"); *accord*, *Stanley v. Illinois*, *supra*, 405 U.S. at 665 (Burger, J., dissenting); *see also*, *Lalli v. Lalli*, 439 U.S. 259, 269 (1978) ("The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned . . . . Indeed, the mother may not know who is responsible for her pregnancy"). Requiring the consent of putative fathers would needlessly complicate and delay the adoption process.[13] It would be tantamount to grant-

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[13] In addition, a putative father's right to "veto" an adoption would amount to a post hoc overruling of the biological mother's decision to seek adoption as the best care alternative for her baby. Mothers should not automatically be presumed to be acting out of spite in opposing custody by a biological father. The mother's reasons could range from her knowledge of the father as a criminal or rapist to her preference for a stable, two-parent family for her child. In this case, at the time of the initial hearing, McNamara was unemployed, divorced, and caring for two sons of whom he had actual, but not legal, custody. 1981 Tr. 27-28; 37-39; 2/25/1985 Tr. 160. He testified at the hearings that he wanted Katie because he had a "right" to her, and that she would be in the care of a babysitter during the day. 1981 Tr. 34-35; 2/27/1985 Tr. 173-74. *See BBIC* 21 ("To be wanted ceases to be beneficial [to the child] to the degree that 'wanting' the child is not based on reciprocity of feelings and on recognition of the child's own per-

ing joint custody of newborns to unmarried parents who are not cohabitating—clearly an unwise and intrusive proposal.

The State and the child have a strong interest in immediate placement. Each year about fifteen percent of the children born in the United States are illegitimate. *Caban v. Mohammed*, *supra*, 444 U.S. at 402 n.2. (Stevens, J., dissenting). Each year approximately seventy percent of these children are adopted. *Id.* Unless a State statutory scheme allows for the prompt and immediate placement of newborn infants, the State and the infants will suffer. Absent prompt adoptions, the State must provide foster care involving a substantial investment of community resources.[14] Such infants do not receive the stable two-parent loving environment that they need to develop properly. *Lehr v. Robertson*, *supra*, 463 U.S. at 266 ("it has long been accepted that illegitimate children whose parents never marry are at risk medically, emotionally and educationally"); BBIC 46 ("infants born as a result of an unwanted pregnancy are greatly at risk of an initially much reduced chance of healthy growth and development. This risk is avoided when the infant is placed with loving adults at birth"). Moreover, as an infant grows older, it is far less likely to be adopted. As a result, the

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sonal characteristics. The child is placed in jeopardy whenever the adults' claim for him is based solely or predominantly on motives such as the wish to gain some financial advantage; to score over a warring partner after divorce . . . to cement an insecure marital relation . . ."). No position is taken here on what, if any, weight circumstances similar to McNamara's should have in termination proceedings. The point is that a relinquishment can be, and in most instances is, a caring decision, and the mother's desire to have the adoption proceed deserves statutory protection.

[14] Although 274,000 children were in foster care in 1982, and although many of these children were available for adoption, only 9,591 adoptions of children by foster parents occurred in that year. National Committee for Adoption, *Adoption Factbook* 11 (1985).

State's interest and the infant's needs compel a statutory scheme that allows adoption to occur as quickly as possible. By requiring only the mother's consent where the father is unwed and noncustodial, California's statute advances the interest of the State, mother and infant. It streamlines the adoption process and allows for prompt and final placement of infants into stable, loving homes. At the same time, it provides unwed fathers with the right to notice and a hearing concerning custody. As applied, the California statute does not engage in impermissible gender-based discrimination between unwed mothers and unwed fathers over the right to consent to the adoption of a newborn infant.

CONCLUSION

For the reasons stated, and for the further reasons presented in Appellee's brief, Amicus respectfully requests that the decision of the California Court of Appeal be affirmed.

Respectfully submitted,

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